EXHIBIT 3

OFFICE FOR DISPUTE RESOLUTION
DUE-PROCESS HEARING FOR
G. W.
FILE 10264/08-09 LS
BEFORE JAKE MCELLIGOTT, SPECIAL EDUCATION HEARING OFFICER

SUSQUENITA SCHOOL DISTRICT POST-HEARING BRIEF

PROCEDURAL HISTORY OF THE CASE

Before the Hearing Officer is a due process request filed by the parents (the "Parent" or "Parents," as applicable) of George W. ("George"), a student in the Susquenita School District.

The Due Process Complaint Notice in issue was filed with the Office for Dispute Resolution on June 25, 2009. The Complaint Notice alleged that an ESY issue warranted an expedited hearing. The matter was initially assigned to Hearing Officer Daniel Myers, who scheduled an expedited hearing for August 12, 2009. That hearing date was continued at the request of the parents. The matter was then reassigned to Hearing Officer McElligott.

The parties participated in a Resolution Meeting on or about September 29, 2009, that did not resolve the underlying dispute. The matter was then scheduled for hearing beginning January 5, 2010. That hearing date was continued at the Parents' request due to the illness of a Parent witness. The hearing was continued to February 23, 2010.

On or about January 27, 2010, the Parents requested to amend their Complaint and asked for an expedited hearing to address a dispute arising from potential discipline of George. The Hearing Officer scheduled an expedited hearing for February 17, 2010, to address this issue. In the interim, the parties briefed their positions regarding the expedited hearing. On or about February 12, 2010, the Hearing Officer ruled that this dispute was not ripe, dismissed the amendment to the Complaint and canceled the February 17 expedited hearing.

On February 23, 2010, the date scheduled to hear the merits of the case, the parties participated in lengthy settlement discussions that were not successful in achieving settlement. Live testimony began March 2, 2010, starting with testimony relating only to the issue of the limitations period that applied to the underlying case. Testimony was taken on that date from Mrs. Peiffer and from Todd Kehler, the former Special Education Case Manager for Susquenita. The Hearing Officer ruled on March 3, 2010, that the applicable limitations period would be two years from the date of the filing of the complaint, i.e., that it would be limited to events dating back to June 25, 2007.

Live testimony resumed on March 3 and continued on April 12, April 13, and April 26, 2010. The parents presented live testimony from the following witnesses: Andrew Klein, an educational consultant; Lee Ann Grisolano, Ph.D., a neuropsychologist; and Agnes Peiffer, George's mother.

Susquenita presented live testimony from Bryan Dilks, a teacher at Cumberland Perry Area Vocational-Technical School ("CPAVTS"); CPAVTS Principal Diane Franklin; Susquenita teacher Amy Landers; Susquenita teacher Bill Lundberg; Susquenita teacher Jade Ruel; Susquenita teacher Matt Bingaman; Rebecca Blazi, a Speech/Language clinician under contract with Susquenita; Susquenita Special Education Supervisor Holly Sawyer; and Susquenita District Superintendent Daniel W. Sheats, Ed.D.

Testimony concluded April 26, 2010. The delivery of transcripts occurred on or about May 6, 2010. The Hearing Officer directed a briefing schedule with briefs due May 24, 2010; the briefing deadline was later extended at the request of the Parents to May 29, 2010.

STATEMENT OF FACTS[1]

George is a 10^{th} grade student enrolled at Susquenita who also attends CPAVTS part-time, where he takes classes in the afternoon. He has been enrolled at Susquenita since his second grade year. The 2009-10 school year is the first year George has attended CPAVTS.

The genesis of this case, or what Parents' counsel called the "crux of the Complaint" (R.241), arose in the fall of 2008 when George was in ninth grade. Susquenita, which requires students who have not scored proficient in the statewide assessment (the "PSSAs") to take a Standards class in the area of non-proficiency, discovered in or about October 2008 that George and other high school students were not rostered for Standards classes. R.1085. Susquenita's Standards classes provide additional focused instruction on the anchors and standards relevant to the PSSA in question. R.1222. George was not proficient in Reading or Math and should have been enrolled in Standards classes for each. Susquenita reviewed George's schedule and made a judgment that in order to get George into the Standards classes, he should be substituted from a computer applications class into a Standards English class and from a resource room into a Standards Math class. R.1091, 1094. These events

[1] Susquenita's references herein to the transcript of proceedings are indicated by the Letter "R." followed by the applicable transcript page; references to a party's exhibits are to the notation "P-Ex." or "SD-Ex.," followed by the applicable exhibit number and, if pertinent, the designation "p." together with the page reference(s) within the exhibit.

occurred within days after George's IEP had been revised for 9th grade. P-Ex. 31 and 32.

The School District corrected the Standards scheduling error in October and modified George's schedule accordingly. This modification resulted in disagreement with George's parents, who opposed George taking either of the two Standards classes.

In August 2008, the parents had waived a re-evaluation report on George that was due in 2008. P-Ex. 30. The parents, however, sought an independent evaluation for a neuropsychological evaluation of George. The District agreed to pay for an independent neuropsychological, R.1094, which was conducted by Dr. Lee Ann Grisolano. P-Ex. 3. The District also agreed to pay for an independent psychiatric evaluation, R.1101, which was conducted by Valentins F. Krecko, M.D. P-Ex. 6.

The District re-convened a re-evaluation report ("RR") on April 3, 2009. P-Ex. 37. After the RR, The parties participated in an IEP meeting on April 29, 2009; the meeting produced an IEP (P-Ex. 38) that the parents refused to sign off on a Notice of Recommended Educational Placement ("NOREP"). P-Ex. 38, p. 40-42; R.1108-09. The parties met again on August 25, 2009, and agreed on terms of IEP, including provisions for George to attend CPAVTS. P-Ex. 39. The parents signed a NOREP (P-Ex. 40) and George began his school year attending Susquenita in the mornings and attending CPAVTS in the afternoon, where he studies automotive technology. He remained in this setting throughout the proceedings.

ARGUMENT

I. THE PARENTS FAILED TO ESTABLISH THAT GEORGE'S EVALUATIONS WERE INAPPROPRIATE.

The Parents challenged the adequacy of the 2009 RR, convened on April 3, 2009.[2] For the reasons below, the RR met the requirements of the IDEA and is appropriate.

Section 614(b)(2) of the Individuals with Disabilities Education Act ("IDEA"[3]), 20 U.S.C. §1414(b)(2), provides that in conducting an evaluation the local educational agency shall:

> "(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--
>
> (i) whether the child is a child with a disability; and
>
> (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in

[2] The RR was constrained by the delay of the Grisolano neuropsychological. The RR was subject to a 60-day deadline due to the Parent consent. The Parents sought to waive the deadline, but Susquenita believed there was no provision in the regulations to extend the 60-day date. Thus, the RR convened on April 3, 2009, without the complete Grisolano report. R.1103. The incomplete Grisolano report was considered at the RR. R.1104. The complete Grisolano report was received at the April 2009 IEP meeting and was considered at that time. R.1105.

[3] Congress amended the IDEA in 2004 via the Individuals with Disabilities Education Improvement Act, which took effect on July 1, 2005. References herein to the IDEA reflect the act as amended. Likewise, references to IDEA's implementing regulations, found at 34 CFR 300.1 *et seq*, are as amended.

and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."

20 U.S.C. §1414(b)(2).

Additionally, Section 614(b)(3) of IDEA imposes additional requirements on local educational agencies to ensure that:

(A) assessments and other evaluation materials used to assess a child under this section--

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations."

20 U.S.C. §1414(b)(3).

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. Section 614(b)(4) of the IDEA provides that:

> "Upon completion of the administration of assessments and other evaluation measures, The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5)."
> 20 U.S.C. §1414(b)(4).

The parents failed to establish that the District did not satisfy the requirements of Section 614(b). George was evaluated in 2009 via a variety of assessment tools and strategies. No single measure or assessment was the sole criterion for determining whether he is a child with a disability. The evaluation included information provided by the parents. P-Ex. 37, p. 3-4. Outside evaluator information provided by the parents was considered. R.1103-08. No assessment instruments were shown to be racially or culturally discriminatory or shown not to be "technically sound assessment instruments." George was assessed in all areas of suspected disability, including a neuropsychological evaluation, a psychiatric evaluation, speech and language evaluation, psychological evaluation, and occupational therapy evaluation. R.1102. The tests were administered in George's language.

The instruments were used for purposes for which they are valid and reliable. The instruments were administered by trained and knowledgeable personnel and were administered in accordance with any instructions provided by their publishers. The Student was assessed in all areas of suspected disability.

Nonetheless, George's parents misconstrue the IDEA and its jurisprudence where they contend that the 2005 RR (P-Ex. 8) was deficient in failing to identify George with a specific learning disability ("SLD") in math. This contention seemingly follows that, because the 2009 RR identified George as SLD in math, then George should have been so identified in 2005 as well. The IDEA, however, does not require so precise an identification. Both federal and Pennsylvania regulations define an SLD as:

> "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations…."
>
> 34 C.F.R. 300.8(c)(10); 22 Pa. Code §14.102(a)(2)(ii).

Susquenita identified George in the 2005 RR as eligible for services under the disability category "specific learning disability" (P-Ex.8, p.5), and thereby satisfied the regulatory language pertinent to identifying his eligibility for services. That the 2009 RR more specifically identified George as needing services in the areas of reading and math is moot—George was already identified as SLD, namely, having "a disorder in **one or more** of the basis psychological processes." Id. (emphasis added). By its own terms, the definition does not require the school to isolate an area of disability. Thus, Susquenita, cannot create a past misidentification by being more precise as to SLD deficit areas in 2009 than in a prior RR.

Furthermore, the parents have presented no credible proof that George's deficit in math constituted a SLD prior to 2009. The Sleber, Manito and Small reports (P-Ex. 20, p.7; P-Ex. 21, p.6; P-Ex. 24, p.1, and P-Ex. 25, p. 1) refer to a "mathematics disorder," yet none cite to any assessment data that supports the statement. R.1202-03. The parents rely essentially on George's performance on past PSSA tests and 4sight tests as their sole empirical data that he was disordered in the area of math. These assessments, however, are not achievement tests: the PSSA is a criterion-referenced test of proficiency in skills thought to be needed at a relevant grade level in the future, while the 4sight test is merely a predictive test. R.1221, 1246.[4]

George's evaluations were reasonable based on the information reasonably known to the school district. George's performance on testing assessments yielded inconsistent results. R.121, 373, 464, 833. It should come as no surprise that his performance in the classroom would vary as it did on testing assessments.

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[4] That the criterion is derived from skills based on a point in the future is a key distinction that further rules out using the PSSAs and 4sight tests as measures of George's progress in special education. PSSAs are based on 5th, 8th and 11th grade skills, respectively. The 4sight tests similarly prognosticate the student's proficiency of skills thought to be tested on the next relevant PSSA. R.1246. Thus, George's performance on the 4sight test in 9th grade is a predictor of his proficiency in skills in 11th grade material. R.1248. The scores are in no way a measure of George's progress on his current grade level. Furthermore, that George's 4sight tests would be flat or even decline does not reflect that George was "going downhill" on the tests. R.1249-51.

The assertion by Mr. Klein that George's IQ had declined is absurd. Mr. Klein, not a school psychologist, made the assertion that the 2009 RR was proof that George's Full Scale IQ had dropped a standard deviation over seven years. R.263. This claim was refuted by Dr. Grisolano, who opined that she did not put a lot of stock in George's FS IQ as a measure of his overall intellectual potential. R.446. She also opined that the test administered in 2009 tended to yield lower scores from its previous edition. R.395. Mr. Klein's assertion holds no credible weight.

The evidence shows that the school district appropriately considered the evaluations of Dr. Grisolano (neurologist), Dr. Krecko (psychologist), and Ms. Goepfert (audiologist), as well as other evaluation reports. R.1094. The complete Grisolano report was not available until after the RR meeting concluded. R.1103-04. The Krecko report contained no educational recommendations. R.1108.

The evaluation reports do not credibly support a diagnosis of ADHD or anxiety and depression. As to ADHD, Dr. Grisolano conceded that of the persons from whom she took surveys, only Mrs. Peiffer scored George in the statistically significant range for ADHD. R.449. None of George's teachers scaled George in the statistically significant range. In fact, another survey that Dr. Grisolano provided to George and his mother showed that neither viewed George in the statistically significant range for hyperactivity. R.452. Thus, the conclusion that George should be diagnosed ADHD has no credible weight.

Likewise, there is no credible evidence supporting a diagnosis that George suffers from anxiety or depression, much less that it impacts his performance at school. George's teachers singularly commented on his appropriate adjustment for school. R.732; 846; 867. No teachers opined that George presented any anxiety or emotional issues that in any way interfere with his intellectual or emotional functioning. While Klein stated that anxiety, depression and affective disorders "absolutely permeate [George's] day and his being," R.268, there is no direct observational evidence that this is so. Incredibly, the entirety of time that Klein himself spent in George's presence was less than a full school day. R.257-262. Nowhere in Klein's report (P-Ex. 2) does he indicate any observation of anxiety, depression or affective disorders.

The parents attempt to present the PSSA tests as themselves evidence to identify a learning disability. Mr. Klein erroneously referred to the PSSAs as an achievement test. R.339. They are not. R.1225. The PSSA tests have no value as a diagnostic tool for assessing eligibility for special-education. R.1267. Likewise, the parents improperly portray the PSSA tests as evidence of whether a student is making adequate yearly progress. To the contrary, the PSSAs are an assessment to determine whether a school is making adequate yearly progress toward teaching students to the level of proficiency. R.1261.

Furthermore, that George was not identified as needing expressive and receptive speech and language services until 9th grade is of minimal importance. Through 8th grade, George received speech and language instruction for articulation deficits. R.375, 521. In the ninth-grade RR, he was identified for the first time as having deficits in the areas of receptive and expressive language. R.1008. There is no evidence in the record that receptive and expressive deficits exposed themselves at a statistically significant level prior to the ninth grade RR. Nonetheless, when these deficits were identified by Ms. Blazi, the School District revised George's programming appropriately. George received moderately intensive speech and language services of two days per week. R.1010. It must be noted, however, that Ms. Blazi initially regarded George's deficits in expressive and receptive language as "moderate" upon her initial testing. R.1008. Later, however, after having taught George speech and language from October 2009 through April 2010, she revised her observation to conclude that George's deficits in both expressive and receptive language were not "moderate" but rather were "mild." R.1021.

II. THE PARENTS FAILED TO ESTABLISH THAT GEORGE'S IEPS WERE INADEQUATE.

The Parents challenged the IEPs in effect for George through June 25, 2007. This would include P-Ex. 16 (effective through 10/7/07), P-Ex. 23 (effective through 10/15/08), P-Ex. 31 (effective through 10/2/09) and P-Ex. 39 (the current IEP effective through 8/25/10). The essence of their challenges is that the IEP failed to produce greater gains in George's reading and math skills and failed to address perceived deficits in George's ability to independently organize his routine. These complaints should be disregarded, as the Parents' challenges are not in accord with the requirements of the IDEA.

Congress enacted the IDEA *inter alia* "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). The Act defines free appropriate public education ("FAPE") as:

> "special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]."

20 U.S.C. §1401(9).

"The Supreme Court has construed the FAPE mandate to require 'education specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction.'" ***T.R. v. Kingwood Township Bd. of Educ.***, 205 F.3d 572, 577 (3d Cir. 2000), *quoting* ***Bd. of Educ. of Hendrick Hudson Central School Dist. v. Rowley***, 458 U.S. 176, 188-89 (1982).

Congress established procedures to guarantee disabled students access and opportunity, but not substantive outcomes. ***Thompson R2-J School District v. Luke P.***, 540 F.3d 1143, 1151 (10th Cir. 2008), *cert. den.* __U.S.__, 77 USLW 3468 (2009). "Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." ***Rowley***, at 197. Thus, FAPE does not require "the furnishing of every special service necessary to maximize each handicapped child's potential." ***Id.***, at 199; *also*, ***Hartmann v. Loudoun County Bd. of Ed.***, 118 F.3d 996, 1001 (4th Cir. 1997).

The issue of whether an IEP is appropriate is a question of fact. ***Carlisle Area School District v. Scott P.***, 62 F.3d 520, 526 (3d Cir. 1995). An appropriate IEP does not need to provide for the best possible education but instead must be "reasonably calculated to enable the child to receive educational benefits." ***Rowley***, at 207. It requires more than a *de minimis* educational benefit, and must provide for "significant learning and meaningful benefit." ***Ridgewood Board of Education v. N.E.***, 172 F.3d 238, 247-248 (3d Cir. 1999). However, it does not require that a school district "provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by [the] IDEA represents only a basic floor of opportunity." ***S. v. Wissahickon Sch. Dist.***, 2008 U.S. Dist. LEXIS 56473, at *7 (E.D. Pa. 2008), *citing* ***Carlisle***, 62 F.3d at 534. The IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." ***Rowley*** at 204. "Generally speaking, a school district is required to show only that the proposed IEP would provide a meaningful education benefit and not that it would be the best possible education." ***Travis G. v. New Hope-Solebury School District***, 544 F. Supp. 2d 435, 441 (E.D. Pa. 2008).

Whether an IEP is appropriate "can only be determined as of the time it is offered to the student, and not at some later date." ***Fuhrmann v. East Hanover Bd. Of Educ.***, 993 F.2d 1031, 1040 (3d Cir. 1993). Thus, evidence acquired after the creation of the IEP should only be used to evaluate the reasonableness of a school district's decisions at the time they were made. ***Susan N. v. Wilson Sch. Dist.***, 70 F.3d 751, 762 (3d Cir. 1995). "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." ***Fuhrmann***, 993 F.2d at 1040. Accordingly, a student's ultimate failure to make progress, viewed with the benefit of hindsight, does not necessarily render an IEP inadequate. *See* ***Neena S. v. School District of Philadelphia***, 2008 U.S. Dist. LEXIS 102841, at *36-37, *citing* ***Fuhrman*** at 1040 and ***Carlisle*** at 534. Nonetheless, the importance of evidence of the student's "ability to advance from one grade to the next cannot be ignored." ***Leighty v. Laurel School District***, 457 F. Supp. 2d 546, 557 (W.D. Pa. 2006) (finding that IEP was calculated to allow student to progress and was achieving that objective, where student with severe learning disability, which by its very nature renders it difficult for a child to learn on a level consistent with intellectual potential, was able to advance from one grade to the next).

In addition to the FAPE requirement, the IDEA provides that states must establish procedures that assure that to the maximum extent appropriate children with disabilities are educated with children who are not disabled. 20 U.S.C. § 1412(a)(5).

George's goals in reading were reasonable based on his current functioning levels. While Susquenita was reasonably attempting to teach George to become a more fluent reader, George demonstrated reasonable proficiency in applying his reading skills to maintain passing grades at Susquenita. Parents' witness Klein was critical that George's fluency goal remained at the 120 wpm level for two years. R.235. Yet to impose a goal on George that would reflect growth beyond that would be inappropriate if, as appears to have occurred, George reached a plateau on the goal. Despite this apparent plateau, George continued to perform reasonably well in the classroom, made passing marks and advanced grades, and thereby demonstrated the basic progress that ***Rowley*** measures for an adequate IEP.

George's instruction in math is reasonable. George received passing grades in algebra in ninth grade. He is receiving passing grades and geometry in 10th grade. That Susquenita assigned George to an algebra class in 9th grade is reasonable, particularly in view of his ambition to enroll at CPAVTS. In fact, the Perkins Act, the federal statute governing vocational education, made algebra a curricular requirement for vo-tech classes in the 2008-09 school year. R.1264.

George's IEP met the ***Rowley*** standard of obtaining passing marks and advancing from grade to grade. George demonstrated progress in his goals. R.1130-38. The IEP was appropriate.

Globally, the parents objected to the IEP on the basis that it failed to produce gains, in his mother's view, of one year for each year taught. R.642. Klein, however, admitted that the fact of George's learning disability itself means that he would not acquire information at the rate one would predict based on his intellectual ability. R.323. The parents, through their expert, Klein, also unreasonably cherry-picked grade equivalent scores as a tell-all indicator of George's progress. Klein, however, exposed the unreliability of reliance on grade equivalents, when he agreed that they are a "worse than facile" measure and are essentially useless. R.336. Dr. Grisolano further discredited unreasonable reliance on grade equivalents. R.447. There is simply no evidence in the record that George is capable of making a one year gain in reading or in math in a year's time, and to strike down the entire program due to a failure to raise George by that level is absurd.

III. THE PARENTS FAILED TO ESTABLISH THAT SUSQUENITA COMMITTED A PROCEDURAL VIOLATION THAT CAUSED ACTUAL EDUCATIONAL DEPRIVATION TO GEORGE.

The Parents have alleged that Susquenita failed to provide several areas of IEP content. These issues are insubstantial and the Parents failed to establish either that Susquenita failed to provide actual IEP content or that any alleged failure resulted in an actual deprivation to George.

A procedural violation of the IDEA is actionable only when it "results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP formation process." ***L.R. v. Manheim Twp. Sch. Dist.***, 540 F. Supp. 2d 603, 616 (E.D. Pa. 2008). *See also* ***Souderton Area Sch. Dist. v. J.H.***, 2009 U.S. Dist. LEXIS 10781 at *6 (E.D. Pa. 2009) ("Procedural errors do not violate the right to a FAPE unless they result in 'the loss of educational opportunity, seriously infringe upon the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits.").

Likewise, any alleged non-compliance with the strict terms of the IEP is not a *de facto* violation of the IDEA. "We do not believe we must interpret the IDEA in such a way that even minor implementation failures automatically violate the statute, nor has any other court done so." ***Van Duyn v. Baker School District***, 502 F.3d 811, 822 fn 4 (9th Cir. 2006). IEP is not a legally binding contract. ***K. v. City of South Portland***, 407 F. Supp. 2d 290, 301 (D. Me. 2006). The favored view would hold an alleged IEP non-compliance to the same standard as a procedural violation, that is, requiring the student or family to show evidence that the alleged non-compliance resulted in actual loss of educational opportunity or otherwise infringed upon the opportunity to participate in the IEP process. ***Manheim Twp. Sch. Dist.***

The alleged non-compliance in issue synthesize to about seven items[5]: an alleged change in George's schedule in October 2008, an alleged failure to implement a pre-class and end-of-class checklist, the alleged breach of a promise to provide George with keyboarding in 9th grade, an alleged requirement that Susquenita compels the Parents to re-teach George at home, the alleged failure to provide George with a computer in 9th grade, the alleged absence of transition planning in the 8th grade IEP, and an alleged failure to provide an aide for George

[5] As evidence of the trivial degree of scrutiny the Parents undertook of the IEP, they even disputed its educational environment calculations. The Parents, however, misinterpreted 2008 revisions to the State regulations as to how such time is calculated. R.1137-38.

at CPAVTS. The "schedule change" issue directly follows from the Standards classes and is discussed in Part VI of this brief, below. The remaining items are discussed immediately below.

~~The parents contend that~~ Susquenita violated by the IEP through its alleged failure to implement a "checklist" (P.Ex. 39, p.48-49), a highly detailed sequence of steps for George to orient himself in the classroom each day. First, Susquenita disputes that the checklist is an element of the IEP.[6] It is not specially designed instruction, but rather ~~is a monitoring tool that~~ the parent has attempted to impose. R.1125. Furthermore, there is no evidence that the checklist, even if required, was causally connected to a lost educational opportunity for George: the checklist evolved from Mrs. Peiffer's personal view that if George were to follow a sequence of steps for a number of weeks that the sequence would take hold and

[6] The checklist follows a pattern in which the Parent is fixated on George's perceived deficits. CPAVTS Principal Franklin noted that had she seen the checklist on admitting George she would have thought he had a more severe disability than he actually presented. R.781. The record is replete with the Parents' beliefs that George needed:

- A psychiatric assessment despite any record of adjustment disorders, P.Ex.6;
- Behavioral therapy not in response to any instance of misbehavior at school, P.Ex. 20, 21, 24, 25;
- Occupational therapy even though he meets the functional standard negating OT services, namely that teachers could read his handwriting, R.1079; and
- Vision therapy, P.Ex. 12.

The universal assessment of George by District representatives is that he is an engaging, friendly young man. Where the Parents see a bundle of problems to fix, the School sees a student with mild to moderate learning issues who is making reasonable adjustments, progressing through his high school years and learning a marketable skill for adult life.

become his habit. Mrs. Peiffer's view of its benefit, however, is unsupported by any credible evidence in the record and is in fact rejected by the testimony of Dr. Grisolano. She opined that, given George's slowness in visual scanning, it would take him a long time to find what he needed on the checklist and she doubted that he "would successfully make use of [the checklist]." R.406. Indeed, Special Education Supervisor Sawyer described it as "cumbersome" and "overwhelming." R.1125. Despite the above, the mere fact that Mr. Dirks himself testified that George functions without the need for the checklist is proof that its absence causes George no detriment. R.749.

The Parents contended that George did not get keyboarding instruction in middle school at Susquenita and that George's ninth grade schedule would expressly provide for the same. First, the Parents' premise is incorrect, as George, like all Susquenita students, received home row keyboarding instruction in grades 5 through 8. R.1088. Second, Ms. Sawyer denied making any such representation to the Parents. R.1089.

The Parents argue, mostly through Klein, that the IEP improperly requires the parent to reteach George at home. Mrs. Peiffer herself fails to note that this provision was inserted in the IEP at her express demand. R.1127. Thus, the school is not requiring George to be retaught at home by his parents. Rather, Mrs. Peiffer has insisted that this be put in the IEP. The school, to avoid an unnecessary battle with the parent over the content of the IEP, agreed to include the provision.

The Parents' allegation that George was deprived of a computer in 9th grade is erroneous. Mr. Bingaman provided George with a white Macintosh computer on approximately the second day of ninth grade. R.947. Mrs. Peiffer informed Mr. Bingaman that the Mac wasn't adapting to their home network and that George needed different software for the Mac operating system. Thus, Mr. Bingaman then ordered a PC to replace the Mac, which occurred in or about the middle of November. R.948. George had the use of the Mac while waiting for the PC to arrive. R.948.

The Parents' allegation that transition services were improperly excluded from George's 8th grade IEP (P-Ex. 23) is erroneous. The IEP was written in October 2007, and included a provision to identify George as in need of transition planning. R.1074. The regulation requiring an 8th grader's IEP to include the specifics of a transition plan were not yet in place. That requirement, found at 22 Pa. Code §14.131(a)(5), was amended June 27, 2008, effective July 1, 2008. *See* 38 Pa. Bulletin 3575.

Finally, the parents allege a violation of the IEP in CPAVTS' refusal to implement a one-on-one aide for George. While an aide is called for in the IEP, the

CPAVTS principal advised Mrs. Peiffer that the activities at CPAVTS are not conducive to having a student closely attached to an aide. R.782-783. The testimony shows that Mrs. Peiffer agreed verbally to the principal's strong objection to having an aide directly with George at CPAVTS. Admittedly an aide is not being provided at CPAVTS in strict compliance with the IEP, although there is an aide in Mr. Dirks' classroom. R.787. Still, there is no evidence that the absence of a direct aide is causing any deleterious effect on George: he makes it to class, he follows the day's agenda on the blackboard, opens his books and gets to work. R.749. As with the checklist, there is no evidence that this is depriving George of an "educational opportunity." The fact that no direct aide is provided at CPAVTS is by all appearances an alleged violation for the sake of asserting a violation.

IV. THE PARENTS FAILED TO ESTABLISH THAT GEORGE IS ENTITLED TO EXTENDED SCHOOL YEAR PROGRAMMING.

The IEPs in issue consistently found that George was not eligible for Extended School Year ("ESY") programming. The Parents contend, with no empirical evidence that George so qualified, that Susquenita should have provided ESY to George.

Under the federal IDEA regulations, Extended School Year ("ESY") services are to be provided to an eligible student if necessary to assure that the student receives FAPE. 34 C.F.R. 300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

> (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
>
> (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
>
> (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
>
> (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
>
> (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
>
> (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
>
> (vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

School districts are not required to provide ESY based upon "[t]he desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132(c)(3).

In George's case, there is no evidence of regression or recoupment losses. The IEP discussion focused on the facts that George did not routinely lose skills during breaks and made progress on his goals. R.1077. The record is devoid of evidence that educational interruptions resulted in a decrease in George's skills, much less that any alleged decrease was actually caused by the interruption. There is no evidence supporting regression or inability to recoup skills over breaks, even over short breaks such as the Christmas/New Year's holiday. Again, there is no evidence that breaks caused a drop in skills. The record shows that George's potential entitlement to ESY was reviewed by the IEP, considered and rejected. R.1077-78. The parents have failed to meet their burden to establish an entitlement to ESY.

V. THE PARENTS FAILED TO ESTABLISH THAT GEORGE'S AUGUST 2009 IEP COULD BE IMPLEMENTED WITHOUT A NOREP.

The Parents suggested in their case that Susquenita acted in bad faith by conditioning the implementation of the August 2009 IEP (and with it, George's placement at CPAVTS) on the Parents signing a NOREP to implement said IEP.[7] This argument is a red herring that belies the Parents' previous refusal to sign a NOREP for a substantially similar IEP. Nonetheless, the District is correct in that

[7] Correlative to this argument, the Parents contend that the District could have implemented the April 2009 IEP despite the disapproved NOREP. P-Ex. 38, p. 40-42. For the same reasons described herein, their contention is erroneous.

the August 2009 IEP required a signed NOREP for its implementation and that the prior IEP and NOREP from October 2008 governed George's placement in the absence of a signed NOREP.

The IDEA regulation pertaining to placement, 34 CFR §300.518(a), reads as follows:

> "**Child's status during proceedings.**
> (a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement."

A student's current educational placement is not defined in the IDEA or its regulations. The term is generally interpreted to mean the current education and related services and placement provided in accordance with the most recently approved IEP. ***Drinker v. Colonial School Dist.***, 78 F.3d 859, 864 (3d Cir. 1996); ***George A. v. Wallingford Swarthmore School District***, 2009 WL 2837717 (E.D. Pa. 2009). In ***Drinker***, the Third Circuit stated that the current educational placement is the IEP actually functioning when the dispute arose and "stay put" was invoked. If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. ***Id.***, at 867, *quoting* ***Thomas v. Cincinnati Bd. Of Ed.***, 918 F. 2d 618, 625-26 (6th Cir. 1999).

Susquenita acted appropriately by declining to implement the 10th grade IEP until the parent signed a NOREP for the IEP. The parents seemingly contend that the 10th grade IEP for which they signed a NOREP was unchanged in content from the April 2009 iteration (for which they refused to sign a NOREP); they contend that the District acted in bad faith by asserting that George's stay put placement was at Susquenita pending the signing of a NOREP. The parents, however, miss the point that the 10th grade IEP included transition items, which in turn specifically provided for a substantial amount of programming for George in CPAVTS P-Ex. 39, p.20. Thus, the 10th grade IEP did provide for a change in placement that could be effected only through a signed NOREP and Susquenita responded appropriately by refusing to implement the change until the parents had signed the NOREP. R.1108-09.

VI. THE PARENTS FAILED TO ESTABLISH THAT GEORGE SHOULD HAVE BEEN EXEMPTED FROM THE STANDARDS CLASSES.

The essence of the case derives from the Parents' objection to George being placed in Standards classes. They argue that placing George in the Standards classes was futile with regard to him reaching proficiency in English and Mathematics. They contend—with no legal support—that the IDEA trumps State and local curricular requirements. Further, their argument is inconsistent with their contentions as to IEP appropriateness. These arguments should be disregarded by the Hearing Officer.

Dr. Sheats testified that while curriculum content is largely a matter of local control, State regulations do impose a proficiency requirement for graduation:

> "(a) *Requirements through the 2013 – 2014 School Year.* Each school district, including a charter school, shall specify requirements for graduation in the strategic plan under §4.13 (relating to strategic plans). Requirements through the 2013 – 2014 school year must include course completion and grades, completion of a culminating project, results of local assessments aligned with the academic standards in a demonstration of proficiency in Reading, Writing and Mathematics on either the state assessments administered in grade 11 or 12 or local assessment aligned with academic standards and State assessments under §4.52 (relating to local assessment systems) at the proficient level or better to graduate. The purpose of the culminating project is to assure that students are able to apply, analyze, synthesize and evaluate information and communicate significant knowledge and understanding."
>
> 22 Pa. Code §4.24.

Based on the above, the Susquenita School District requires both that students demonstrate proficiency on state assessments and that students in grade 11 not achieving a proficient or advanced level in Reading, Writing or Mathematics are placed in remedial courses designed to increase the level of student understanding to the proficient level or better. R.1227.

The essence of this case is the parent's objection to Susquenita placing George in Standards classes in English and Math. Dr. Sheats credibly testified that Standards classes are a response by the school district to the requirements of the

No Child Left Behind Act and local and State curriculum requirements. R.1221-22. Based on these requirements, Dr. Sheats, as the Chief School Administrator of Susquenita, was charged with the requirement of ensuring that students receive supplemental instruction toward becoming proficient in the PSSAs. The Standards classes are a reasonable response to that charge, and fulfill the District's obligations under Chapter 4 regulations of the State Board of Education.

The October 2008 schedule change resulted from the discovery that George was mistakenly not rostered for Standards English and Math. The Standards classes are nonetheless reasonable and consistent with George's IEP. R.1091-1095. They give him additional time on task in a small class setting in the areas of reading and math. The Standards classes teach the school district curriculum. George receives specially designed instruction in these classes. In fact, for 10th grade, George's standards class instruction in reading follows the Wilson program, which is exactly what the parents asked that George receive for 10th grade.

The parents erroneously contend that this was a "change" in George's IEP. The only change, however, was in the content of the class, which itself was not prescribed in the IEP. Although the Present Education Levels section of George's IEP certainly listed his classes, this was to concisely describe George's grades, and was not for the purpose of listing his class schedule as a fixed, immutable element of the IEP. In fact, neither the letter nor spirit of the IEP requirements calls for something along the lines of a "course schedule" as a section in IEP.

The folly of the parents' argument that Susquenita altered the IEP by assigning George to Standards classes is borne out by this concrete example: if listing courses in the present education levels mandated that any schedule change required mutual agreement, then an IEP that took effect other than on the first day of classes (as George's did) would compel the student to take the same courses in the subsequent school year, unless a new IEP were agreed upon. The stay-put provision, however, is not construed so narrowly as to mandate the student remain in the exact physical location where he or she was schooled at the time the dispute arose. *See* ***George A.*** at 550, *citing* ***Michael C. v. Radnor Twp. Sch. Dist.***, 1999 U.S. Dist. LEXIS 1352, *3 n.10 (E.D. Pa. 1999).

The Parents demonstrate a basic misunderstanding of the Standards classes and what they do for George. The most curious testimony in this case came from Mrs. Peiffer where she conceded the George won't be proficient in the PSSAs. R.686. She rhetorically wondered why George should even be placed in standards classes if he's never going to be proficient on the PSSAs. But Mrs. Peiffer's position is strikingly at odds with her beliefs that George should be receiving additional instruction in his IEP for reading and math, and that George is capable of making a year's progress in a year's time. R.642. Her argument at its core makes no sense: she wants George to get more instruction in reading and math, but she doesn't want him to get that instruction in a Standards class.

VII. THE PARENTS FAILED TO ESTABLISH A SECTION 504 VIOLATION.

The Parents raise a catch-all allegation that Susquenita violated George's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. They present no facts other than their allegations that George was deprived an appropriate education under the IDEA. Susquenita contends that the "crux" of their case, that George should be excused from the Standards classes, is the polar opposite of a Section 504 claim. Their contentions should be rejected by the Hearing Officer.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability within federally-funded programs:

> "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
>
> 29 U.S.C. § 794(a).

This prohibition extends to public school systems. 29 U.S.C. §794(b)(2)(B).

Claims under the IDEA and Section 504 are similar causes of actions. The IDEA imposes an affirmative duty on states which accept certain federal funds to provide a FAPE for all their disabled children. ***Lawrence Twp. Bd. of Educ. v.***

New Jersey, 417 F.3d 368, 370 (3d Cir. 2005), *citing* 20 U.S.C. § 1412(a)(1). The Third Circuit has described Section 504 as a "negative prohibition" against disability discrimination in federally-funded programs. ***Ridgewood***, 172 F.3d at 253. The substantive requirements between Section 504's negative prohibition and the IDEA's affirmative duty, however, have few differences, if any. ***Id.***; ***W.B. v. Matula***, 67 F.3d at 492-93. A violation of the IDEA, however, is not a *per se* violation of Section 504, as the elements of a Section 504 violation must still be proved. ***Andrew M. v. Del. County Office of Mental Health and Mental Retardation***, 490 F.3d 337, 350 (3d Cir. 2007); ***Derrick F. v. Red Lion Area Sch. Dist.***, 586 F. Supp. 2d 282, 298 (M.D. Pa. 2008).

To establish a violation of § 504, a plaintiff must prove that "(1) he is 'disabled' as defined by the Act; (2) he is 'otherwise qualified' to participate in school activities; (3) the school receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school." ***Ridgewood***, 172 F.3d at 253 (*citing* ***Matula***, 67 F.3d 484, 492 (3d Cir. 1995)), *abrogated on other grounds by* ***A.W. v. Jersey City Pub. Schs.***, 486 F.3d 791, 803-06 (3d Cir. 2007). The plaintiff must demonstrate that the defendant knew or should reasonably have been expected to know of her disability but need not prove that the discrimination was intentional. ***Ridgewood***, 172 F.3d at 253. The Third Circuit has determined that the critical issue in a Section 504 claim is whether student was "excluded from participation in, denied the benefits of, or subject to discrimination" in the District. *See* ***Christen G. by Louise G. v. Lower Merion Sch. Dist.***, 919 F. Supp. 793, 821 (E.D. Pa. 1996).

Section 504 claims are premised on a prohibition against discrimination by a school district, that is, they flow from a failure of a school district to avoid discriminating against a disabled student. The essence of this case is that Susquenita has compelled George to take Standards classes in instruction areas where he is not proficient. This is not a Section 504 violation, however, because Susquenita compels all other non-handicapped students to take Standards classes in areas where they are not proficient. In fact, to exclude George from Standards classes would be a classic Section 504 violation. Thus the Parents' Section 504 argument should be dismissed.

CONCLUSION

For the reasons set forth above, Susquenita appropriately provided FAPE to George. The Complaint should be dismissed.

Respectfully Submitted,

CLARK & KREVSKY, LLC

Dated: May 28, 2010

By: [signature]

Frank P. Clark, Esquire
Attorney I.D. PA #35443
20 Erford Road
Suite 300A
Lemoyne, PA 17043
(717) 731-8600
(717) 731-4764 (fax)
FPC@Clark-Krevskylaw.com
Attorney for School District

CERTIFICATE OF SERVICE

I, FRANK P. CLARK, do hereby certify that I served a true and correct copy of the foregoing Susquenita School District Post-Hearing Brief upon the following below-named party by e-mail today, May 28, 2010.

SERVED UPON:

Yvonne M. Husic
HUSIC LAW OFFICE
Northwood Office Center
2215 Forest Hills Drive, Suite 35
Harrisburg PA 17112
ymhusic@aol.com

Dated: May 28, 2010